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Emily B Caudill REGULATIONS COMPILER

1 ENERGY AND ENVIRONMENT CABINET

2 Department for Environmental Protection

3 Division of Waste Management

4 (Amendment)

5 401 KAR 42:290. Ranking system.

6 RELATES TO: KRS ~~[12.010-12.020,]~~ 224.60-120, 224.60-130, 224.60-140

7 STATUTORY AUTHORITY: KRS 224.60-130(1)

8 NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.60-130(1)~~[224.130(1)]~~

9 requires the cabinet to establish by administrative regulation the procedures to administer the
10 financial responsibility and petroleum storage tank accounts of the Petroleum Storage Tank
11 Environmental Assurance Fund. This administrative regulation establishes the criteria for
12 ranking facilities~~[sites]~~ according to the extent of damage to the environment, the potential threat
13 to human health, and the financial ability of the petroleum storage tank owner or operator to
14 perform corrective action, in order to address the completion of corrective action and the
15 subsequent reimbursement of eligible costs in accordance with 401 KAR 42:250.~~[payment of~~
16 ~~claims.]~~

17 Section 1. Applicability.(1) In order to determine the sequence by which written
18 directives shall be issued in order to address the completion of corrective action, and the
19 subsequent reimbursement of those eligible costs in accordance with 401 KAR 42:250, a ranking
20 system~~[A ranking system to address the completion of corrective action and the payment of~~

1 claims] shall be established for the Financial Responsibility Account and the Petroleum Storage
2 Tank Account, respectively, as set forth in Sections 2 and 3 of this administrative regulation.

3 (2)(a) Actions directed and documented by the Environmental Response Team, upon the
4 cabinet's declaration of an environmental emergency, shall take priority over the ranking system
5 in this administrative regulation. Once the Environmental Response Branch terminates the
6 emergency phase, subsequent actions at the UST facility shall be prioritized in accordance with
7 this administrative regulation;

8 (b) Actions contracted by the Division of Waste Management shall take priority over the
9 ranking system in this administrative regulation. Once the Division of Waste Management
10 completes or terminates contracted work, subsequent actions at the UST facility shall be
11 prioritized in accordance with this administrative regulation.

12 (3) Facilities performing site checks or initial abatement at the written direction of the
13 cabinet in accordance with the Site Check Outline or the Release Response and Initial Abatement
14 Outline, incorporated by reference in 401 KAR 42:060, shall not be subject to the ranking system.

15 (4)(a) Those facilities for which the owner or operator has verified, through submittal of an
16 Affidavit of Waiver for PSTEAF Reimbursement, DEP6092, that reimbursement from the
17 PSTEAF will not be sought shall not be subject to the ranking system.

18 (b) The affidavit shall be notarized.

19 (5) A facility that has been ranked based upon accurate classification of the UST system,
20 in accordance with 401 KAR 42:080 and this administrative regulation, shall not thereafter
21 receive a lower priority ranking as a result of the performance of directed corrective actions.

22 (6) All UST facilities, required to classify in accordance with the Classification Outline
23 incorporated by reference in 401 KAR 42:080, shall be ranked in accordance with this

1 administrative regulation regardless of previous ranking determinations made under the
2 administrative regulations effective September 13, 2006.

3 (7) Facilities conducting corrective action under the provisions of 401 KAR Chapter 42
4 in effect prior to April 18, 1994 shall not be required to classify in accordance with 401 KAR
5 42:080, but shall be ranked in accordance with this administrative regulation.

6 Section 2. Ranking System for the Financial Responsibility Account. Facilities eligible to
7 participate in the Financial Responsibility Account shall be ranked as follows:

8 (1) For purposes of addressing the completion of corrective action:~~[determining extent of~~
9 ~~damage to the environment:]~~

10 (a) Rank 1. Those facilities, with releases for which the division has not issued a No
11 Further Action Letter, that are a~~[the]~~ source of confirmed contamination within domestic-use~~[to~~
12 ~~domestic use]~~ wells, domestic-use springs, or domestic-use cisterns exceeding the maximum
13 contaminant levels specified in 401 KAR Chapter 8. This ranking shall also include facilities
14 with releases, for which the division has not issued a No Further Action Letter, that are a source
15 of confirmed vapor intrusion, as defined in 401 KAR 42:005, in occupied residential and
16 commercial buildings.~~[levels specified in Groundwater Table I of the Classification Outline,~~
17 ~~(August 2006), incorporated by reference in 401 KAR 42:080.]~~

18 (b) Rank 2. Those facilities, with releases for which the division has not issued a No
19 Further Action Letter, that are required to use the screening levels listed in ~~[Class IV and]~~
20 Groundwater Table 1~~[I]~~ of the Classification Outline, [(August 2006),] incorporated by reference
21 in 401 KAR 42:080, within the point of compliance, where groundwater contamination,
22 exceeding the screening levels listed in Groundwater Table 1, has been confirmed within the
23 point of compliance.~~[at levels exceeding those listed in Groundwater Table I but has not resulted~~

1 in the contamination of domestic use wells, springs, or cisterns. Facilities conducting corrective
2 action under the provisions of 401 KAR Chapter 42 in effect prior to April 18, 1994 shall be
3 placed into this ranking if required to utilize the levels listed in Groundwater Table I and
4 groundwater contamination has been confirmed at levels exceeding those listed in Groundwater
5 Table I.]

6 (c) Rank 3. Those facilities, with releases for which the division has not issued a No
7 Further Action Letter, that are required to use the screening levels listed in [Class III and]
8 Groundwater Table 2[I] of the Classification Outline, [(August 2006),] incorporated by reference
9 in 401 KAR 42:080, within the point of compliance, where groundwater contamination,
10 exceeding the screening levels listed in Groundwater Table 2 has been confirmed within the
11 point of compliance.[~~at levels exceeding those listed in Groundwater Table I but has not resulted~~
12 ~~in the contamination of domestic use wells, springs, or cisterns.~~]

13 (d) Rank 4. Those facilities, with releases for which the division has not issued a No
14 Further Action Letter, that are required to use the screening levels listed in [Class IV and]
15 Groundwater Table 3[H] of the Classification Outline, [(August 2006),] incorporated by
16 reference in 401 KAR 42:080, within the point of compliance, where groundwater
17 contamination, exceeding the screening levels listed in Groundwater Table 3, has been confirmed
18 within the point of compliance[~~at levels exceeding those listed in Groundwater Table II but has~~
19 ~~not resulted in the contamination of domestic use wells, springs, or cisterns~~]. Facilities subject to
20 the provisions of 401 KAR 42:070, Section 1(3) and subject to the requirements in place prior to
21 April 18, 1994[~~conducting corrective action under the provisions of 401 KAR Chapter 42 in~~
22 ~~effect prior to April 18, 1994~~] shall be placed into this ranking [~~if required to utilize the levels~~

1 ~~listed in Groundwater Table II and groundwater contamination has been confirmed at levels~~
2 ~~exceeding those listed in Groundwater Table II].~~

3 (e) Rank 5. Those facilities, with releases for which the division has not issued a No
4 Further Action Letter, for which:

5 1. Soil contamination above applicable screening levels has been confirmed; and

6 2. Groundwater contamination above applicable screening levels has not been
7 confirmed.~~[Those facilities required to use the levels listed in Class III and Groundwater Table II~~
8 ~~of the Classification Outline, (August 2006), incorporated by reference in 401 KAR 42:080,~~
9 ~~where groundwater contamination has been confirmed at levels exceeding those listed in~~
10 ~~Groundwater Table II but has not resulted in the contamination of domestic use wells, springs, or~~
11 ~~cistern.~~

12 (f) Rank 6. ~~All other facilities that are not included in Ranks 1, 2, 3, 4, or 5, as specified~~
13 ~~in this subsection.]~~

14 (2) Facilities shall be further categorized within their respective Rank as determined in
15 subsection (1)[4] of this section, based on the financial ability of the owner or operator as
16 follows:

17 (a) Facilities shall be placed in Category 1 within their respective rank if:

18 1. The owner's or operator's average total income for the last five (5) years is less than or
19 equal to \$50,000; or

20 2. The owner or operator is registered and recognized by the federal government as a tax-
21 exempt nonprofit organization.

1 (b) Facilities shall be placed in Category 2 within their respective rank if the owner's or
2 operator's average total income for the last five (5) years is more than \$50,000 but less than or
3 equal to \$100,000.

4 (c) Facilities shall be placed in Category 3 within their respective rank if the owner's or
5 operator's average total income for the last five (5) years is more than \$100,000.

6 (d) Facilities within each category shall be further prioritized based on the cabinet's
7 evaluation of the threat posed to human health and the environment by the release from a
8 petroleum storage tank.

9 (e) The cabinet shall utilize the information provided in an owner's or operator's
10 Application for Assistance, incorporated by reference in 401 KAR 42:250, for purposes of
11 determining financial ability to perform corrective action.

12 (3) Cabinet inspectors shall be provided access to a facility for the purpose of verifying
13 [facility] classification. Refusal by an owner or operator to allow access requested by cabinet
14 inspectors shall[will] render the facility ineligible for reimbursement from the cabinet.

15 (4) If the cabinet receives misrepresentations, or otherwise inaccurate information, or
16 receives new information related to specific facilities, it may amend facility rankings and
17 categories in accordance with subsections (1) and (2)[1 and 2] of this section.

18 ~~[(5) A facility that has been ranked based upon accurate classification of the facility shall~~
19 ~~not thereafter receive a lower priority ranking as a result of the performance of directed~~
20 ~~corrective actions.]~~

21 Section 3. Facilities eligible to participate in the Petroleum Storage Tank Account shall
22 be ranked as follows:

1 (1) For purposes of addressing the completion of corrective action;~~[determining extent of~~
2 ~~damage to the environment;]~~

3 (a) Rank 1. Those facilities with releases that are a[the] source of confirmed
4 contamination to domestic-use~~[domestic-use]~~ wells, domestic-use springs, or domestic-use
5 cisterns exceeding the levels specified in Groundwater Table 1[F] of the Classification Outline,
6 ~~[(August 2006);]~~ incorporated by reference in 401 KAR 42:080. This ranking shall also include
7 facilities with releases that are a source of confirmed vapor intrusion, as defined in 401 KAR
8 42:005, in occupied residential and commercial buildings.

9 (b) Rank 2. Those facilities, with releases for which the division has not issued a No
10 Further Action Letter, that are required to use the screening levels listed in ~~[Class IV and]~~
11 Groundwater Table 1[F] of the Classification Outline, ~~[(August 2006);]~~ incorporated by reference
12 in 401 KAR 42:080, within the point of compliance, where groundwater contamination,
13 exceeding the screening levels listed in Groundwater Table 1, has been confirmed within the
14 point of compliance.~~[at levels exceeding those listed in Groundwater Table I but has not resulted~~
15 ~~in the contamination of domestic use wells, springs, or cisterns. Facilities conducting corrective~~
16 ~~action under the provisions of 401 KAR Chapter 42 in effect prior to April 18, 1994 shall be~~
17 ~~placed into this ranking if required to utilize the levels listed in Groundwater Table I and~~
18 ~~groundwater contamination has been confirmed at levels exceeding those listed in Groundwater~~
19 ~~Table I.]~~

20 (c) Rank 3. Those facilities, with releases for which the division has not issued a No
21 Further Action Letter, that are required to use the screening levels listed in ~~[Class III and]~~
22 Groundwater Table 2[F] of the Classification Outline,~~[(August 2006);]~~ incorporated by reference
23 in 401 KAR 42:080, within the point of compliance, where groundwater contamination,

1 exceeding the screening levels listed in Groundwater Table 2, has been confirmed within the
2 point of compliance.~~[at levels exceeding those listed in Groundwater Table I but has not resulted~~
3 ~~in the contamination of domestic use wells, springs, or cisterns.]~~

4 (d) Rank 4. Those facilities, with releases for which the division has not issued a No
5 Further Action Letter, that are required to use the screening levels listed in [Class IV and]
6 Groundwater Table 3[H] of the Classification Outline,[(August 2006),] incorporated by reference
7 in 401 KAR 42:080, within the point of compliance, where groundwater contamination,
8 exceeding the screening levels listed in Groundwater Table 3, has been confirmed within the
9 point of compliance.~~[at levels exceeding those listed in Groundwater Table II but has not~~
10 ~~resulted in the contamination of domestic use wells, springs, or cisterns.]~~ Facilities conducting
11 corrective action under the provisions of 401 KAR Chapter 42 in effect prior to April 18, 1994
12 shall be placed into this ranking ~~[if required to utilize the levels listed in Groundwater Table II~~
13 ~~and groundwater contamination has been confirmed at levels exceeding those listed in~~
14 ~~Groundwater Table II].~~

15 (e) Rank 5. Those facilities, with releases for which the division has not issued a No
16 Further Action Letter, for which:

17 1. Soil contamination above applicable screening levels has been confirmed; and

18 2. Groundwater contamination above applicable screening levels has not been confirmed.

19 ~~[Those facilities required to use the levels listed in Class III and Groundwater Table II of~~
20 ~~the Classification Outline, (August 2006), incorporated by reference in 401 KAR 42:080, where~~
21 ~~groundwater contamination has been confirmed at levels exceeding those listed in Groundwater~~
22 ~~Table II but has not resulted in the contamination of domestic use wells, springs, or cistern.~~

1 ~~(f) Rank 6. All other facilities that are not included in Ranks 1, 2, 3, 4, or 5, as specified~~
2 ~~in this subsection.]~~

3 (2) Facilities shall be further categorized within their respective Rank as determined in
4 subsection (1)[4] of this section, based on the financial ability of the owner or operator
5 (applicant) as follows:

6 (a) Facilities shall be placed in Category 1 within their respective rank if:

7 1. The owner's or operator's average total income for the last five (5) years is less than or
8 equal to \$50,000; or

9 2. The owner or operator is registered and recognized by the federal government as a tax-
10 exempt nonprofit organization.

11 (b) Facilities shall be placed in Category 2 within their respective rank if the~~if:~~

12 ~~1. The~~ owner's or operator's average total income for the last five (5) years is more than
13 \$50,000 but less than or equal to \$100,000.

14 (c) Facilities shall be placed in Category 3 within their respective rank if the owner's or
15 operator's average total income for the last five (5) years is more than \$100,000.~~if:]~~

16 (d) Facilities within each category shall be further prioritized based on the cabinet's
17 evaluation of the threat posed to human health and the environment by the release from a
18 petroleum storage tank.

19 (e) The cabinet shall utilize the information provided in an owner's or operator's
20 Application for Assistance for purposes of determining financial ability to perform corrective
21 action.

1 (3) Cabinet inspectors shall be provided access to a facility for the purpose of verifying
2 [facility] classification. Refusal by an owner or operator to allow access requested by cabinet
3 inspectors ~~shall~~[will] render the facility ineligible for reimbursement from the cabinet.

4 (4) If the cabinet receives misrepresentations, or otherwise inaccurate information, or
5 receives new information related to specific facilities, it may amend facility rankings and
6 categories in accordance with subsections (1) and (2)[1 and 2] of this section.

7 ~~[(5) A facility that has been ranked based upon accurate classification of the facility shall
8 not thereafter receive a lower priority ranking as a result of the performance of directed
9 corrective actions.]~~

10 Section 4. Ranking Allocations. (1) Issuance of written directives shall be prioritized
11 according to rank and category. Facilities placed within the Financial Responsibility Account
12 shall take priority over those facilities placed within the Petroleum Storage Tank Account for
13 each individual ranking and category. The prioritization for the issuance of written directives
14 shall be in the following order: ~~[Issuance of written directives shall be prioritized for facilities~~
15 ~~within the Financial Responsibility Account and the Petroleum Storage Tank Account,~~
16 ~~respectively according to rank and category, in the following order:]~~

17 (a) Rank 1, Category 1;

18 (b) Rank 1, Category 2;

19 (c) Rank 1, Category 3;

20 (d) Rank 2, Category 1;

21 (e) Rank 2, Category 2;

22 (f) Rank 2, Category 3;

23 (g) Rank 3, Category 1;

1 (h) Rank 3, Category 2;

2 (i) Rank 3, Category 3;

3 (j) Rank 4, Category 1;

4 (k) Rank 4, Category 2;

5 (l) Rank 4, Category 3;

6 (m) Rank 5, Category 1;

7 (n) Rank 5, Category 2;

8 (o) Rank 5, Category 3;

9 ~~[(p) Rank 6, Category 1;~~

10 ~~(q) Rank 6, Category 2;~~

11 ~~(r) Rank 6, Category 3.]~~

12 (2) The cabinet shall consider the current legislatively-enacted budget, [associated
13 appropriations,] and available funding in making the allocations described in subsection (1)[4] of
14 this section.

15 (3) The cabinet shall notify owners or operators of the decision to suspend written
16 directives for specified rankings within either the Petroleum Storage Tank Account or the
17 Financial Responsibility Account, respectively, upon a determination of insufficient funding
18 being available to initiate corrective action in all rankings.

19 Section 5. Incorporation by reference. (1) "Affidavit of Waiver for PSTeAF
20 Reimbursement", DEP 6092 (April 2011) is incorporated by reference.

21 (2)(a) This material may be inspected, copied, or obtained, subject to applicable copyright
22 law, at the Division of Waste Management, 200 Fair Oaks Lane, Second Floor, Frankfort,
23 Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m.

1 (b) This material is available on the Division of Waste Management's Web site at
2 <http://waste.ky.gov/ust>. ~~[(4) Actions directed and documented by the Environmental Response~~
3 ~~Team, upon the cabinet's declaration of an environmental emergency, shall take priority over the~~
4 ~~ranking system in this administrative regulation. Once the Environmental Response~~
5 ~~Branch[Team] terminates the emergency phase, subsequent actions at the facility shall be~~
6 ~~prioritized in accordance with this administrative regulation.~~

7 ~~(5) Facilities performing site checks or initial abatement at the written direction of the~~
8 ~~cabinet shall be reimbursed in lieu of the ranking system.]~~

401 KAR 42:290 approved for filing.

4/14/11
Date

Leonard K. Peters
Leonard K. Peters, Secretary
Energy and Environment Cabinet

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on May 24, 2011 at 10:00 A.M. (Eastern Time) at 300 Fair Oaks, Frankfort, KY 40601. Individuals interested in being heard at this hearing shall notify this agency in writing by May 17, 2011, five workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until May 31, 2011. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Cassandra Jobe
Division of Waste Management
200 Fair Oaks, Second Floor
Frankfort, KY 40601
Telephone: (502) 564-6716 Fax (502) 564-4049
Email: Cassandra.Job@ky.gov

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Cassandra Jobe

(1) Provide a brief summary of:

(a) What this administrative regulation does:

This administrative regulation outlines the establishes the criteria for ranking facilities according to the extent of damage to the environment, the potential threat to human health, and the financial ability of the petroleum storage tank owner or operator to perform corrective action, in order to address the completion of corrective action and the subsequent reimbursement of eligible costs in accordance with 401 KAR 42:250.

(b) The necessity of this administrative regulation:

This administrative regulation is necessary to establish ranking for UST facilities.

(c) How this administrative regulation conforms to the content of the authorizing statutes:

This administrative regulation conforms to the content of the authorizing statute by establishing a ranking system.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:

This administrative regulation assists in directing which corrective actions are performed at contaminated UST facilities based on ranking.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation:

This amendment makes changes that are consistent with the changes to 401 KAR 42:080 for UST system classification.

(b) The necessity of the amendment to this administrative regulation:

This amendment is necessary to be consistent with the changes to 401 KAR 42:080 for UST system classification.

(c) How the amendment conforms to the content of the authorizing statutes:

The amendment conforms to the content of the authorizing statute by maintaining a ranking system for the PSTA and FRA accounts.

(d) How the amendment will assist in the effective administration of the statutes:

The amendment will assist in the effective administration of the statute by establishing criteria for ranking so corrective actions can be directed and reimbursed from the PSTA and

FRA accounts.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:

There are approximately 3,700 UST facilities registered in Kentucky.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:

Petroleum UST owners who do not wish to seek reimbursement from the PSTEAF will have to complete and submit the Affidavit of Waiver form. Petroleum UST owners seeking reimbursement will have to abide by the rankings established in this amendment.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):

Petroleum UST owners who submit the Affidavit of Waiver form will incur the cost of corrective action at their own expense.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):

Corrective actions at UST facilities that rank low in accordance with this amendment may incur the cost of the corrective action, but will benefit in having the facility cleaned.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially:

There will be no additional cost to the agency to implement this amendment.

(b) On a continuing basis:

There will be no additional cost to the agency to implement this amendment.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation:

The funding to be used for implementation of this amendment is the PSTEAF.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:

An increase in funding will not be necessary to implement this amendment.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees:

This administrative regulation does not establish or affect any fees.

(9) TIERING: Is tiering applied? (Explain why or why not)

Yes. This administrative regulation ranks UST systems based on classification, which takes into account contamination of soil and groundwater and the potential impact to human health and the environment.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation No. 401 KAR 42:290

Contact Person: Cassandra Jobe

1. Does this administrative regulation relate to any program, service, or requirements of a state or local government (including cities, counties, fire departments, or school districts)?

Yes X No

If yes, complete questions 2-4.

2. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?

The Division of Waste Management

3. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.

KRS 224.60-130(1)

4. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?

This amendment will not generate revenue.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?

This amendment will not generate revenue.

(c) How much will it cost to administer this program for the first year?

This amendment will not cost the agency additional funds to implement.

(d) How much will it cost to administer this program for subsequent years?

This amendment will not cost the agency additional funds to implement.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation:

Detailed Summary of Material Incorporated by Reference

I. This administrative regulation incorporates by reference the "Affidavit of Waiver for PSTEAF Reimbursement", DEP 6092, (April 2011). This document is to be submitted by owners and operators who wish to perform corrective action at a UST facility but will not be seeking reimbursement from the PSTEAF.

This document consists of 1 page.